UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 248

Docket No. CH-1221-08-0352-W-1

Anil N. Parikh,

Appellant,

v.

Department of Veterans Affairs,

Agency.

December 10, 2008

Peter H. Noone, Esquire, Avery Dooley Post & Avery, LLP, Belmont, Massachusetts, for the appellant.

Timothy B. Morgan, Esquire, and Lisa Yee, Chicago, Illinois, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision, issued May 29, 2008, that dismissed his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, the Board GRANTS the appellant's petition, VACATES the initial decision, and REMANDS the appeal for further adjudication.

BACKGROUND

¶2 The agency proposed to remove the appellant from his Physician position based upon the charge of unauthorized release and disclosure of private and protected information. Appeal File, Tab 6, subtab 4c. The agency specified that the appellant sent letters that included attachments of unsanitized personal medical records to an attorney on four occasions, thereby violating agency regulations and Part C, Section 1171 of Public Law 104-191, the Health Insurance Portability and Accountability Act of 1996 (HIPAA). *Id*. In response, the appellant asserted that these letters were protected whistleblowing because they were addressed to the agency's Office of Inspector General, and the Director for the University of Illinois Residency Program, and discussed substantial and specific dangers to public health or safety. Appeal File, Tab 6, subtab 4b. The appellant further explained that he merely provided his attorney, Members of Congress, and other agency officials with courtesy copies of these disclosures. *Id*. The agency, however, found the charge sustained and effected the appellant's removal. Appeal File, Tab 6, subtab 4a.

¶3 Upon exhausting his remedies with the Office of Special Counsel (OSC), the appellant filed an IRA appeal asserting that the agency removed him in retaliation for whistleblowing, and requested a hearing. Appeal File, Tab 1. In response, the administrative judge informed the appellant of the jurisdictional requirements in an IRA appeal and ordered the appellant, among other things, to identify every alleged protected disclosure at issue. Appeal File, Tab 2.

¶4 The appellant then identified nine disclosures that he claimed were protected under the Whistleblower Protection Act (WPA). Appeal File, Tab 13. The first disclosure was a letter the appellant sent to the agency's Inspector General, with a copy sent to Senator Barack Obama, a member of the Senate's Oversight Committee for the agency, that described alleged violations of law, gross mismanagement, and gross waste of funds caused by poor workload management at two agency facilities. *Id*. The appellant stated that the second

disclosure was a letter to the Inspector General, with copies sent to Senator Obama and agency Secretary Jim Nicholson, discussing an alleged unnecessary and improperly performed medical procedure by an intern, an incident of patient abuse, and inadequate medical staffing. *Id*. The appellant claimed that this disclosure evidenced a substantial and specific danger to public health and safety, a violation of law, gross mismanagement, and gross waste of funds. The appellant further stated that he sent a letter describing the same incidents to Dr. Fred Zar, the Program Director of Internal Medicine Residency for the University of Illinois, who had oversight for the University's medical residents at the agency, and also sent a copy of that letter to Marsha Miller, the Complaint Officer for the Accreditation for Graduate Medical Education Committee, who oversaw the residency of programs of various participating universities at the agency. *Id*.

¶5 The appellant next stated that the third disclosure was a letter to Dr. Diane Wayne, the Program Director of Internal Medicine Residency at Northwestern University, who oversaw that university's medical residents at the agency, and Marsha Miller, describing an incident where a medical intern allegedly caused a patient's death during a procedure due to lack of supervision. *Id*. The appellant asserted that this disclosure evidenced a substantial and specific danger to public health and safety, gross mismanagement, and gross waste of funds. *Id*.

¶6 The appellant's fourth disclosure was a letter to Dr. Zar, Ms. Miller, the agency Inspector General, and Verena Hudson, the Director of the Inspector General's Chicago Office, that described an incident where a medical resident failed to follow instructions, thereby causing harm to a patient. *Id*. The fifth disclosure was another letter to the Inspector General and Ms. Hudson. *Id*. This letter reported an inappropriate comment by an agency physician that the appellant asserted evidenced gross mismanagement and a violation of equal employment opportunity (EEO) policies. In his sixth disclosure, the appellant

reported the incident in disclosure 5 to Congressman Luis Gutierrez, who served on the Congressional oversight committee for the agency. *Id*.

¶7 The appellant made his seventh disclosure by sending a letter describing alleged inadequate supervision and training of interns to Michael Kussman, the agency's Acting Under Secretary for Health, James Roseborough, the Director of the agency's Great Lakes Health Care System, Senator Obama and Congressman Gutierrez. *Id*. The appellant claimed that this letter evidence a violation of privacy laws and a substantial and specific danger to public health and safety. *Id*.

¶8 For his eighth disclosure, the appellant sent a letter describing alleged violations of patients' privacy rights, inappropriate racial remarks, fear of retaliation for his disclosures, mismanagement regarding physician workload, and inadequate patient care to Christina Levine, the Inspector General's Director of the DVA Hotline Division, Mr. Kussman, Mr. Roseborough, Senator Obama and Congressman Gutierrez. *Id*. The appellant claimed his letter evidenced a violation of privacy laws and a substantial and specific danger to public health and safety. *Id*. Finally, the appellant sent a letter describing various instances of improper patient care, poor management, and retaliation to Ms. Levine, Mr. Kussman, Mr. Roseborough, Senator Obama, Congressman Gutierrez, and Senators Daniel Kahikina Akaka and Larry Craig. *Id*. Again, the appellant claimed that this disclosure evidenced gross mismanagement, and a substantial and specific danger to public health and safety. *Id*.

¶9 Upon considering the appellant's jurisdictional submission, the administrative judge dismissed the appeal for lack of jurisdiction without holding a hearing. Appeal File, Tab 21. In reaching this conclusion, the administrative judge first explained that, to establish jurisdiction over an IRA appeal, the appellant must show that he exhausted his administrative remedies before OSC, and presented a nonfrivolous allegation that he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), and that the disclosure was a contributing factor in the agency's decision to take a

personnel action against him. *Id*. at 4. The administrative judge then found that the appellant exhausted his administrative remedies before OSC and that his removal constituted a personnel action under the WPA. *Id*. at 4-5.

¶10 The administrative judge then concluded, however, that the appellant did not present a nonfrivolous allegation that any of his disclosures were protected for the following reasons: (1) The appellant was collaterally estopped from raising the first disclosure because he had raised that claim in a previous IRA appeal and the administrative judge in that appeal had found, on the merits, that the disclosure was not protected under the WPA; (2) disclosures 2, 3, 4, 7, 8, and 9 violated HIPAA by disclosing confidential information to unauthorized persons; and (3) disclosures 5 and 6 pertained to conduct that might violate discrimination laws and were, therefore, non-whistleblowing disclosures under 5 U.S.C. § 2302(b)(9). *Id*. at 5-13. The administrative judge, therefore, concluded that, because the appellant did not present a nonfrivolous allegation of jurisdiction, he was not entitled to his requested hearing. *Id*. at 2, 13.

¶11 In his petition for review, the appellant asserts that collateral estoppel does not bar disclosure 1, that disclosures 2, 3, 4, 7, 8, and 9 do not improperly disclose confidential information in violation of HIPAA, and instead are protected because they satisfy a HIPAA exception to the confidentiality requirement, and that disclosures 5 and 6 are protected because they not only evidence violations of EEO policy, but also gross mismanagement and substantial and specific danger to public health and safety. Petition for Review File, Tab 3 at 3-19. The appellant, therefore, asserts that he presented a nonfrivolous allegation of jurisdiction and is entitled to a hearing on the merits. *Id*. at 19.

ANALYSIS

¶12 As the administrative judge correctly stated, the Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that: (1) He engaged in whistleblowing

activity by making a protected disclosure; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. Appeal File, Tab 21 at 4; *see Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 12 (2002).

¶13 There is no dispute that the only issue in question for establishing jurisdiction is whether the appellant presented a nonfrivolous allegation that he made a protected disclosure. Appeal File, Tab 21 at 4-5; Petition for Review File, Tabs 3, 5. In analyzing this issue, we recognize that an appellant is not required to prove that he made protected disclosures, and instead need only present a nonfrivolous allegation that the disclosures were protected. *Boechler v. Department of the Interior*, 109 M.S.P.R. 542, ¶ 7 (2008). Protected whistleblowing occurs where an appellant makes disclosures that he reasonably believes evidence a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *Id*. The proper test for determining whether an employee had a reasonable belief that his disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced one of the conditions set out in 5 U.S.C. § 2302(b)(8). *Id*.

¶14 The administrative judge found that the issue of whether the appellant's first disclosure was protected was decided in a previous Board proceeding and may not be relitigated now. Appeal File, Tab 21 at 8-10. Specifically, the administrative judge found that this disclosure was identical to the disclosure at issue in *Parikh v. Department of Veterans Affairs*, MSPB Docket No. CH-1221-06-0677-W-1 (Initial Decision Feb. 13, 2007), that the administrative judge found on the merits that this disclosure was not protected, and that collateral estoppel bars relitigating that determination now. *Id*.

¶15 On review, the appellant does not dispute that he raised this disclosure in his prior appeal, and that the administrative judge there found that it was not protected. Petition for Review File, Tab 3 at 3-7. He argues, however, that the prior inquiry was limited to whether the disclosure evidenced gross mismanagement or gross waste of funds, while he argues here that the disclosure also evidences fraud and a violation of law, rule, or regulation. *Id*. at 4-7.

¶16 Collateral estoppel, or issue preclusion, is appropriate when: (1) An issue is identical to that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were otherwise fully represented in that action. *McNeil v. Department of Defense*, 100 M.S.P.R. 146, ¶ 15 (2005).

¶17 We find that these requirements are not satisfied here. Although the appellant has raised the identical alleged protected disclosure in both appeals, the issue in the earlier action was whether, after a hearing, the appellant proved by preponderant evidence that the disclosure was protected. The issue in this appeal, however, is whether, on the written record, the appellant has made a nonfrivolous allegation that his disclosure was protected. An appellant may make a nonfrivolous allegation of jurisdiction and ultimately be unable to prove that allegation. In an IRA appeal, however, a nonfrivolous allegation that a disclosure is protected is sufficient to satisfy the threshold issue of jurisdiction, provided that the other jurisdictional criteria are met, regardless of whether the appellant can ultimately prove that the disclosure is protected. *See Boechler v. Department of the Interior*, 109 M.S.P.R. 619, ¶ 17 (2008). Thus, the administrative judge's finding in the earlier appeal, that the appellant did not prove on the merits that his disclosure was protected, does not preclude a finding here that the appellant made

a nonfrivolous allegation that his disclosure was protected for purposes of jurisdiction. *Id*.

¶18 Indeed, we find that the appellant has presented a nonfrivolous allegation that this disclosure is protected. In a letter the appellant sent to both the agency's Inspector General and to Senator Barack Obama, the appellant described alleged improper workload management at an agency facility that was scheduled to close that the appellant claimed were violations of law, gross mismanagement, and gross waste of funds. Appeal File, Tab 13. Specifically, the appellant alleged that, while the agency had scheduled one facility to close and markedly decreased its workload in transition to closing, it continued to schedule and pay a full complement of staff. *Id*. The appellant further alleged that the unnecessary staff at this facility could have easily been reassigned to another busy facility where the agency improperly employed extra staff that would have otherwise not been needed. *Id*. These circumstances constitute a nonfrivolous allegation of a gross waste of funds. *See Van Ee v. Environmental Protection Agency*, 64 M.S.P.R. 693, 698 (1994) (Gross waste of funds constitutes a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government).

¶19 The appellant next argues that disclosures 2, 3, 4, 7, 8, and 9 did not improperly disclose confidential information in violation of HIPAA, and instead were protected because they satisfied a HIPAA exception to the confidentiality requirement and they evidenced one of the conditions set out in 5 U.S.C. § 2302(b)(8). Petition for Review File, Tab 3 at 7-16. As explained above, protected whistleblowing is the disclosure of information by an employee that the employee reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.4(b). Whistleblowing, however, does not include a disclosure that is specifically prohibited by law, or required by Executive order to be kept secret in

the interest of national defense or foreign affairs unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it. 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.4(b); *see Kent v. General Services Administration*, 56 M.S.P.R. 536, 540-44 (1993).

¶20 As the administrative judge correctly noted, HIPAA generally prohibits the disclosure of individually identifiable health information. Pub. L. No. 104-191, Sec. 1177 (Appeal File, Tab 6, subtab 4k at 12); 45 C.F.R. § 164.502. The administrative judge found that disclosures 2, 3, 4, 7, 8, and 9 improperly contained individually identifiable health information that was sent to parties that were unauthorized to receive it, and the disclosures were, therefore, not protected whistleblowing. Appeal File, Tab 21 at 10-12. The appellant does not dispute that these disclosures contained individually identifiable health information. Petition for Review File, Tab 3 at 7-18. He argues, however, that his disclosures satisfy exceptions to HIPAA's general prohibition and are, therefore, not barred by law and are protected under the WPA. *Id*.

¶21 HIPAA's implementing regulations specifically address the propriety of disclosures by whistleblowers. 45 C.F.R. § 164.502(j) provides as follows:

> (j) Standard: Disclosures by whistleblowers and workforce member crime victims.
>
> (1) Disclosures by whistleblowers. A covered entity is not considered to have violated the requirements of this subpart if a member of its workforce or a business associate discloses protected health information, provided that:
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> (i) The workforce member or business associate believes in good faith that the covered entity has engaged in conduct that is unlawful or otherwise violates professional or clinical standards, or that the care, services, or conditions provided by the covered entity potentially endangers one or more patients, workers, or the public; and
>
> (ii) The disclosure is to:

> (A) A health oversight agency or public health authority authorized by law to investigate or otherwise oversee the relevant conduct or conditions of the covered entity or to an appropriate health care accreditation organization for the purpose of reporting the allegation of failure to meet professional standards or misconduct by the covered entity; or
>
> (B) An attorney retained by or on behalf of the workforce member or business associate for the purpose of determining the legal options of the workforce member or business associate with regard to the conduct described in paragraph (j)(1)(i) of this section.

¶22 We find that the appellant has presented nonfrivolous allegations that disclosures 2, 3, 4, 7, 8, and 9 satisfy these requirements. All of these disclosures discuss conduct that arguably violates professional or clinical standards or that potentially endanger patients. Appeal File, Tab 13. Specifically, disclosure 2, concerns an unnecessary and improperly performed medical procedure and a patient abuse incident. *Id*. Disclosure 3 discussed a poorly supervised procedure that allegedly caused a patient's death. *Id*. Disclosure 4 alleges that a resident's failure to follow instructions caused harm to a patient, and disclosure 7 concerns inadequate supervision and training of interns, which could potentially endanger patients. *Id*. Disclosure 8 includes claims of mismanagement of physician's workload and inadequate patient care, and disclosure 9 also describes instances of improper patient care and poor management. *Id*.

¶23 Further, the appellant sent a copy of each of these letters to a person or entity with oversight authority for the agency for the purpose of reporting the misconduct. The appellant sent copies of disclosures 2, 4, 8, and 9 to officials in the agency's Inspector General's Office, and sent disclosures 3 and 7 to agency officials overseeing the resident programs. *Id*. We find that the appellant's submissions describing these disclosures constitute nonfrivolous allegations that the disclosures satisfied the HIPAA exceptions for nondisclosure, regardless of whether the appellant also sent these letters to persons who would not have

satisfied these exceptions.[1] These disclosures also constitute nonfrivolous allegations of a substantial and specific danger to public health and safety, thereby satisfying the requirements of 5 U.S.C. § 2302(b)(8). The appellant has, therefore, met his jurisdictional burden with respect to these disclosures.

¶24 Finally, we agree with the administrative judge's finding that the appellant has not presented a nonfrivolous allegation that disclosures 5 and 6 are protected under the WPA. Those disclosures reported an inappropriate comment by an agency physician that the appellant claimed below evidenced a violation of EEO policies. Appeal File, Tab 13, Attachment to Appellant's Jurisdictional Brief at 7-8 ("Content of Disclosure"). Disclosures that an agency engaged in discrimination and violated discrimination law are covered under 5 U.S.C. § 2302(b)(1) and (b)(9), and are excluded from coverage under section 2302(b)(8). *See McDonnell v. Department of Agriculture*, 108 M.S.P.R. 443, ¶ 22 (2008); *cf. Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1035 (Fed. Cir. 1993) (engaging in protected activity under section 2302(b)(9) does not, by itself, disqualify an individual from seeking corrective action under section 2302(b)(8); however "[t]he facts underlying a section 2302(b)(9) disclosure can serve as the basis for a section 2302(b)(8) disclosure only if they establish the type of fraud, waste, or abuse that the WPA was intended to reach").

¶25 The appellant claims on review that the letters identified as disclosures 5 and 6 contained additional allegations of negligent supervision and inadequate patient care. Petition for Review File, Tab 3 at 19. Ordinarily, we would not

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[1] In light of this finding, we need not determine whether 5 U.S.C. § 2302(b)(8)(B) would provide a sufficient basis, in the absence of 45 C.F.R. § 164.502(j), to protect a disclosure of information generally protected from disclosure under HIPAA. *Compare* 5 U.S.C. § 2302(b)(8)(A) (excluding from coverage a disclosure "specifically prohibited by law") *with* 5 U.S.C. § 2302(b)(8)(B) (covering, without the exclusion mentioned in subparagraph (A), disclosures that are made to the Special Counsel, an agency inspector general, or another agency designated by the head of the agency to receive such disclosures).

consider this new argument because the appellant has failed to show that it is based on new and material evidence not previously available despite the appellant's due diligence. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). However, to the extent that he is referring to his disclosure of a patient care incident that began on August 16, 2006, which is discussed in his separate August 30, 2006 letters addressed to the agency's Inspector General and Dr. Zar, we note that the appellant separately designated this disclosure as disclosure 4, which we have already considered. Appeal File, Tab 13, Attachment to Appellant's Jurisdictional Brief at 6 & Ex. A at 20-23 (August 30, 2006 letters addressed to the agency's Inspector General and Dr. Zar).

¶26 Because the appellant presented nonfrivolous allegations that disclosures 1, 2, 3, 4, 7, 8, and 9 are protected under the WPA, and has otherwise satisfied the remaining jurisdictional requirements in an IRA appeal, he is entitled to a hearing on the merits.[2] *See Shope v. Department of the Navy*, 106 M.S.P.R. 590, ¶ 5 (2007).

[2] We also note that the appellant's removal did not involve a question of professional conduct or competence, which would fall under the exclusive jurisdiction of the agency's Disciplinary Appeal Board and preclude Board jurisdiction. Appeal File, Tab 6, subtab 4a; *see Murphy v. Department of Veterans Affairs*, 102 M.S.P.R. 238, ¶ 7 (2006).

ORDER

¶27 Accordingly, we REMAND this appeal to the Central Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.